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Item 10 of the provisional agenda

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

Progress report on the question of the impunity of perpetrators of violations of human rights (civil and political rights), prepared by Mr. Joinet, pursuant to Subcommission resolution 1994/34

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INTRODUCTION

1. The present progress report is a little different in presentation from the normal format, since the traditional method of drafting, which consists in proposing an amended version of the preliminary report, does not enable the reader to visualize clearly what is new and what changes of direction are proposed. It therefore seemed preferable to produce a report which, in the light of existing suggestions, highlighted the points still needing discussion. The Special Rapporteur has in fact received some interesting suggestions, not only from non-governmental organizations, which joined together to facilitate consultations (the Special Rapporteur met them on five separate occasions), but also from Governments which kindly sent him their comments. All of them are to be thanked.

2. To acquaint the reader better with the state of progress of the study, it seems worthwhile to recapitulate briefly, in chronological order, the action taken by the Subcommission at its recent sessions, since they constitute the background to the present progress report.

(a) Forty-third session, August 1991:

Subcommission decision 1991/110 requesting two of its members (Mr. El Hadji Guissé and Mr. Louis Joinet) to draft a working paper.

(b) Forty-fourth session, August 1992:

Presentation of the working paper (E/CN.4/Sub.2/1992/18);

Resolution 1992/23 deciding to request the co-authors to draft "a study on the impunity of perpetrators of violations of human rights";

Note verbale of 10 December 1992 asking for information on this subject;

The Commission on Human Rights (in resolution 1993/43) and the Economic and Social Council (in decision 1993/266) successively approved the action taken by the Subcommission.

(c) Forty-fifth session, August 1993:

Presentation of the preliminary report (E/CN.4/Sub.2/1993/6), described in error as a "progress" report;

Resolution 1993/37 welcoming the preliminary report and requesting the Special Rapporteurs to extend their study to serious violations of economic, social and cultural rights.

(d) Forty-sixth session, August 1994:

Presentation of the preliminary report (E/CN.4/Sub.2/1994/11) extending the study to economic, social and cultural rights;

Subcommission resolution 1994/34 welcoming with satisfaction the above-mentioned preliminary report. However, on account of the difficulties experienced by the two co-authors in maintaining contact with each other, owing to distance, but mainly because of the complexity of the dual approach to the subject, the Subcommission decided to split the study in two. It entrusted Mr. Louis Joinet with the completion of the first aspect (civil and political rights) and requested Mr. El Hadji Guissé to complete the study of the second aspect (economic, social and cultural rights).

3. Pursuant to resolution 1994/34, the present progress report is submitted to the Subcommission for consideration at its present session. The Subcommission's attention is drawn particularly to the following points, with a view to the presentation of the final report in 1996.

I. POINTS UNDER DISCUSSION CONCERNING THE SCOPE OF IMPUNITY AND IN PARTICULAR ITS DEFINITION

4. A number of non-governmental organizations have expressed the wish for a definition of the concept of impunity to be provided which would encompass all the measures and practices whereby, on the one hand, States fail in their obligation to investigate, try and sentence those responsible for violations of human rights and, on the other hand, they impede the effective enjoyment by victims and their families of the right to know the truth and to have their rights restored.

5. There is a close nexus between the issues associated with the right to reparation and those associated with action to combat impunity. Having considered the matter and consulted with Mr. Theo van Boven, Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, the present Special Rapporteur proposes that, rather than impunity being defined in legal terms, the procedure should be to delimit the scope of action taken to eradicate and prevent impunity, particularly with reference to the violations referred to by Mr. Theo van Boven in his study (E/CN.4/Sub.2/1993/8). Our present thinking is that the scope of this action should basically cover violations of a serious and massive nature or constituting a systematic practice. Cases lying outside the scope of the study would be those of impunity following reprehensible conduct which is isolated or non-premeditated.

6. It will be recalled that a previous report (E/CN.4/Sub.2/1993/6) stated that only violations committed by the State or its agents, or by individuals acting on their orders or with their connivance, fell within the scope of the study. This point deserves discussion in the Subcommission in order to see whether the study should be extended to violations committed by non-State groups, as implied in some statements made by representatives of Governments

to the Commission on Human Rights. Two arguments are advanced in this respect: first, in a situation of civil war the virtual absence of the State - or its disintegration - encourages the committing of atrocities or acts of barbarity which are not all of State origin; secondly, in certain armed struggles, serious crimes and violations may be committed by non-State groups (national liberation movements, guerrillas, etc.), and also the question arises in specific terms when a peace agreement emerges and negotiations concern, among other things, a possible amnesty. In this light, it would be valuable to analyse the observations made by non-governmental organizations and Governments in order to determine whether the study should be extended to violations committed by such groups.

II. THE FOCUS OF DEVELOPMENTS CONCERNING THE ROLE OF CIVIL SOCIETY IN COMBATING IMPUNITY

A. Capacity of victims to organize themselves and to secure reparation

7. The preliminary report (E/CN.4/Sub.2/1993/6) gave prominence to impunity affecting victims considered as individuals, which leads them to band together, especially in the form of non-governmental organizations (NGOs), in order to mobilize opinion. But, it was indicated, impunity can also affect groups as such, and even an entire society. Further consideration should therefore be given to the conditions in which, where violations are massive or affect entire groups, a collective mode of reparation should be substituted for individual and direct compensation of the victims. The notion of a collective victim, or rather of a collective right to reparation, should therefore be the subject of detailed examination.

8. With this in mind, it is proposed that consideration should be given firstly to that part of the above-mentioned study by Mr. Theo van Boven (E/CN.4/Sub.2/1993/8) entitled "Individuals and collectivities as victims" (paras. 14 and 15), as well as chapter VII, "The issue of impunity in relation to the right of reparation for victims of gross violations of human rights", and chapter IX, "Proposed basic principles and guidelines", especially General Principle 7. Secondly, attention should also be directed to the report prepared by the Secretary-General pursuant to Subcommission resolution 1993/29 (E/CN.4/Sub.2/1994/7 and Add.1), and the report of its sessional working group on the administration of justice and the question of compensation (E/CN.4/Sub.2/1994/22).

9. In addition, it would be interesting to examine further the importance of the role of victims' organizations through case-studies relating to Latin America (as exemplified by the Latin American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM)) and Eastern Europe, in view of their specific roles. Any information relating to other victims' organizations playing a significant part in such developments would also be welcome.

B. Need to improve the effectiveness of United Nations mechanisms for the protection of human rights

10. Several NGOs have drawn attention to the disappointment felt by organizations of victims and their families at the ineffectiveness in combating impunity of certain United Nations mechanisms for the protection of human rights. This criticism relates largely to the complexity of their procedures (an example is the procedure laid down in Economic and Social Council resolution 1503 (XLVIII)) and their slowness, as well as to the political "connivance" which results in violations of human rights in some countries being dealt with inadequately or on a selective basis. In certain cases, according to these NGOs, the shortcomings are such as to create a situation in which the United Nations is in danger of contributing to impunity. Proposals should be made on this matter, in consultation with those responsible for the treaty mechanisms and special procedures concerned.

III. CLARIFICATION OF STATES' RESPONSIBILITY IN COMBATING IMPUNITY

A. Dangers inherent in the notion of relative impunity

11. In paragraph 104 of the preliminary report (E/CN.4/Sub.2/1993/6), an attempt was made to examine the notion of "relative impunity" put forward by Mr. van Boven in his study on the right to reparation for victims (E/CN.4/Sub.2/1992/8, para. 3). This notion took into consideration both the illegitimacy of "absolute impunity" as well as the fact that in practice it is impossible to try without exception every single person responsible for serious violations of human rights.

12. Several NGOs have expressed their disagreement with this approach, indicating that it involves the risk of indirectly legitimizing impunity. The opinion of the Subcommission would be of value in this regard.

B. Obligations of States under international law

13. In addition to the obligations mentioned in the preliminary report (paras. 46-59), the Special Rapporteur proposes including among the obligations contracted by States a number of relevant provisions from regional conventions relating to human rights (the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the African Charter on Human and Peoples' Rights). The work of the International Law Commission on the draft Code of Crimes against the Peace and Security of Mankind should also be reflected, as well as work on the proposed basic principles and guidelines of the Special Rapporteur on the right to reparation for victims (E/CN.4/Sub.2/1993/8, para. 137), including General Principle 5. According to that principle, impunity conflicts with the duty to prosecute and punish the perpetrators of gross violations of human rights which is inherent in the entitlement of victims to obtain from the State not only material reparation but also satisfaction of the "right to know" or, more precisely, the "right to the truth". This last point is also worthy of further examination.

14. The Special Rapporteur wishes in addition to take greater account of the important contribution at the international level of the jurisprudence of the

jurisdictional (or parajurisdictional) bodies competent in the area of human rights, such as the Human Rights Committee or, at the regional level, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, among others, because of the originality of their jurisprudence concerning the obligation placed on States to investigate and prosecute perpetrators of violations of human rights.

15. Finally, some thought should be given to the relevance of the general principles of law and custom to the obligations incumbent upon States to combat impunity. Of particular pertinence are the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions (Economic and Social Council resolution 1989/65 of 24 May 1989, annex) and the Declaration on the Protection of All Persons from Enforced Disappearance (art. 13).

C. Value of a comparative study of experience acquired by (extrajudicial) fact-finding commissions

16. Do (extrajudicial) commissions of inquiry represent progress in combating impunity? Being entrusted with seeking the truth rather than justice, they have the merit of revealing the mechanics of a system of violation of human rights, among other things by identifying the entities and authorities involved, reconstructing their role and preserving the evidence. However, these commissions can contribute to a certain form of impunity where their mandate, if imprecise, encourages manipulation or where they substitute themselves outright for justice. A most useful task would be to formulate guidelines for these extrajudicial commission of inquiry (composition, mandate, duration, procedure, working methods, etc). The work could be undertaken on the basis of a comparative study of experience acquired by commissions of inquiry.

D. Military and other courts of special jurisdiction

17. In confirmation of the preliminary report, most Special Rapporteurs point to the extent to which military courts can be a factor in impunity. In the light of studies conducted by the relevant United Nations bodies and by the regional (European, American and African) systems for the protection of human rights, and the positions they have adopted, consideration should be given to measures in this respect that would make the combating of impunity as effective as possible. Should military courts be retained, with their competence limited to purely military offences committed solely by the military? But would that not legitimize the principle of the existence of such courts? Another restrictive option is: should they be retained for wartime use only? A third and more radical option, based on the experience of abolitionist countries, is: should the call be to suppress them altogether? For is it not arguable that the characteristic rules governing these courts (on composition, competence and procedure) bring them into conflict with article 14 of the International Covenant on Civil and Political Rights; among other criteria, this article requires the presence of competent, independent and impartial judges, a difficult claim to make for bodies in which the military remain subject to their superiors, even supposing (although there is no known precedent) that all the other safeguards established by article 14 are respected.

E. Principle of due obedience and mitigating circumstances

18. The principle of due obedience is indisputably a factor in impunity which can lead to perennial violations of human rights. In referring to the relevant work and instruments of the United Nations in this field (the work of the International Law Commission at its thirty-eighth session; article 6, paragraph 1, of the Declaration on the Protection of All Persons from Enforced Disappearance; article 2, paragraph 3, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), several NGOs made the point that the duty of obedience, in other words carrying out the order of a superior, could not be interpreted as exonerating the subordinate from criminal responsibility, even though in certain situations it may be said to constitute a mitigating circumstance. The scope of mitigating circumstances in regard to due obedience should therefore be clarified in order to narrow its negative implications for the elimination of impunity.

F. Amnesty

19. The Special Rapporteur, after consulting numerous NGOs, intends to analyse the role of amnesty in greater depth. In the preliminary report, he emphasized the issues associated with amnesty in periods of transition (see chap. II, sect. C.3, entitled "The legal and political constraints of the processes entailed by reconciliation", paras. 102 et seq.). At the request of the NGOs, he envisages restructuring this section by picking out three situations: amnesty in normal times (examples being the Touvier and Barbie affairs in France); amnesty in a period of democratic transition (the example of Chile); and amnesty in peace agreements (the example of New Caledonia).

20. According to these NGOs, amnesty should be prohibited in all circumstances in which it constitutes an incentive to impunity. Reference is made in particular to the recommendations of the Working Group on Enforced or Involuntary Disappearances against amnesty, and to the Vienna Declaration and Programme of Action. ("States should abrogate legislation leading to impunity for those responsible for grave violations for human rights ... and prosecute such violations, thereby providing a firm basis for the rule of law"; (A/CONF.157/24 (Part I), sect. III, para. 60). The Special Rapporteur will consider the compatibility of these proposals along with the specific requirements of the situations of conflict referred to above in order to reach conclusions and make recommendations.

G. Purges

21. The Special Rapporteur proposes further consideration of questions associated with purges in regard to policies to combat impunity. To what extent can purges remain compatible with respect for human rights? Guidelines could be drawn up on the basis of a comparative analysis of purges that have accompanied certain periods of transition, both in terms of the ethics of the goal and the extent of the process, as well as in regard to its implementation and the guarantees which should be established, in conformity the with relevant international rules, in order that the cure is not worse than the disease and in particular that purges do not become "witch hunts".

H. An international criminal tribunal

22. Several NGOs expressed the wish that priority be given to the creation of a permanent international criminal tribunal. The Rapporteur will endeavour in the final report to give detailed consideration to the various possibilities which have been suggested, such as a permanent international tribunal established under a convention, ad hoc tribunals, the extension of the jurisdiction of existing bodies like the tribunal on the former Yugoslavia, and even the International Court of Justice. That could provide an opportunity to put the various complementary aspects of some of these proposals into perspective in order to arrive at a possible consensus.

CONCLUSION

23. These are the points upon which the Special Rapporteur wishes to know the opinion of the Subcommission in order to be in a position to present his final report at the forty-ninth session.

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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

Interim report on opposition to the impunity of perpetrators of human rights violations (economic, social and cultural rights), prepared by Mr. El Hadji Guissé, pursuant to Subcommission resolution 1994/34

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Origin and purpose of the study

1. In resolution 1991/10, adopted at its forty-third session, the Subcommission on Prevention of Discrimination and Protection of Minorities requested Mr. El Hadji Guissé and Mr. Louis Joinet to draft a working paper expanding on the question of the impunity of perpetrators of violations of human rights.

2. The working paper (E/CN.4/Sub.2/1992/18) was submitted to the Subcommission at its forty-forth session on 12 August 1992. It includes an outline for an analysis of the legal mechanisms and the practices that facilitate impunity and proposes guidelines for the organization of anti-impunity measures.

3. In resolution 1992/23 of 27 August 1992, the Subcommission took note with satisfaction of the working paper prepared by Mr. Guissé and Mr. Joinet and decided to request them to draft a study on the impunity of perpetrators of violations of human rights and to propose measures to combat that practice. The Commission on Human Rights, in resolution 1993/43, endorsed the decision of the Subcommission, and the Economic and Social Council, in decision 1993/266, approved the Commission's endorsement of the decision.

4. In paragraph 4 of its resolution, the Subcommission also invited Governments, competent bodies of the United Nations, the specialized agencies, regional intergovernmental organizations and non-governmental organizations to provide information on the question. Replies were requested by 15 May 1993, in a note verbale by the Secretary-General of the United Nations dated 10 December 1992. Finally, in paragraph 5 of the resolution, the Subcommission decided to consider the preliminary report at its forty-fifth session.

5. In resolution 1994/34 of 26 August 1994, given the communication difficulties, the Subcommission decided, in order to facilitate the treatment of the question, to entrust Mr. Joinet with the completion of the first aspect, concerning civil and political rights, and Mr. Guissé with the second aspect, concerning economic, social and cultural rights, and requested the Special Rapporteurs to submit their respective reports to the Subcommission at its forty-seventh session.

6. As for its purpose, this part of the study is aimed at all current or recently-committed violations of economic, social and cultural rights, regardless of the perpetrators, be they the State or State employees, groups of States, national or international private agencies, individuals and groups of individuals acting outside the purview of the State. What matters is that the perpetrators of such violations should be identified and their responsibilities clearly determined in order for complete and effective sanctions to be taken.

7. It will also be necessary to identify the victims or their representatives and quantify, as far as possible, the harm suffered. Finally, this part of the study will include suggestions and recommendations for preventing and avoiding violations of economic, social and cultural rights and punishing them when committed.

Introduction

8. The first concept of human rights is a political one: it refers to respect by the State for the rights and freedoms of individuals. This concept prohibits State intervention in the area of civil rights and freedoms, i.e. rights aimed at protecting the freedom, security and physical and moral integrity of individuals. These so-called traditional rights derive from an individualistic conception.

9. While these rights were being formulated and codified, a new category of rights, called "cultural rights", materialized, the achievement of which no longer set the individual against the State. The State must ensure the effective enjoyment of economic, social and cultural rights, and in that role, act as an instrument enabling everyone to develop his or her talents to the maximum and achieve self-fulfilment at both the individual and collective level. The State must guarantee everyone within its jurisdiction the protection of his or her rights against any attack, whether from individuals or public or private entities.

10. A third category of rights, some of which are basically economic in nature, has recently appeared. These rights, which some call rights of solidarity, represent frameworks for the exercise of the other human rights. They are the right to development and the right to a healthy environment.

11. In working for the realization of human rights, the State must never lose sight of the individual and the interdependence of all the individual's human rights, whatever their content. This indivisibility and interdependence have been given strong encouragement by the United Nations human rights bodies. The United Nations General Assembly, in resolution 421 E (V) and again in resolution 543 (VI), stated that "the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent" and that "when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man".

12. This common vision confirms their identical legal basis, even if each category of rights has a specific set of rules. The special nature of economic, social and cultural rights, was clearly expressed during the discussion of methods of implementing them. The Secretary-General of the United Nations, speaking of economic, social and cultural rights, noted that it might take time effectively to turn them into rights directly enforceable sanctioned by law.

13. This appears to imply that it is possible to give the economic, social and cultural rights listed in international legal instruments concrete form and turn them into subjective rights that may be invoked in the courts. In that event, the violation of such rights, whoever the perpetrator, should not and cannot go unpunished.

14. During the discussions on measures for implementing economic, social and cultural rights, the representatives of several developing countries expressed the fear that the inevitably slow progress in realizing economic, social and

cultural rights might be taken for unwillingness on their part. In so saying, they had not reckoned with the "developed" countries' determination to undermine any possible basis for a genuinely fair world economic order where economic, social and cultural rights would have a chance of being realized. Soon afterwards, the fears of the former and the hypocrisy of the latter became reality and were the source of serious and gross violations of economic, social and cultural rights and the right to development.

15. It is true that numerous studies have been made of economic, social and cultural rights and the right to development and to a healthy environment, from the point of view of history, basis, legislation or scope; very few have dealt with ways to combat violations of them. Such a study will give these rights their true legal value, and the basis for doing so is already to be found in numerous international human rights instruments.

16. Before listing the most important instruments laying the legal foundations for combating impunity with regard to violations of economic, social and cultural rights, it would seem essential to outline a definition of impunity, on the understanding that it may be expanded on during the analyses required by this study. Impunity might be understood as "the absence or insufficiency of penalties and/or compensation for voluntary or involuntary violations of the rights and freedoms of individuals or groups of individuals". Understood in this way, impunity is not necessarily a lack of penalties, but may also be a question of penalties which are inadequate given the seriousness of the violations they cover, as regards both the punishment itself and compensation for the resulting injury to the victim.

Violations which may give rise to impunity

17. Violations of the economic, social and cultural rights covered in this report may be either deliberate or involuntary, and may be directed against collective rights or individual rights. Finally, they may be committed directly or indirectly by the State, by any group of States, by any other public or private entity, by any group of persons or by an individual. This definition implies that serious inquiries and investigations have already been conducted and responsibilities determined. (The Special Rapporteur refers readers to the first part of this report, covering civil and political rights.)

18. Numerous international legal instruments enshrine the principle of combating impunity with regard to the violations of economic, social and cultural rights and the right to development. It should be noted that the legal framework for the right to a healthy environment is still lacking today. These important instruments include:

The Charter of the United Nations which, in its Preamble and Article 55, lays down this principle. The Preamble states clearly that the United Nations is determined, "to reaffirm faith in fundamental human rights" and "to promote social progress and better standards of life in larger freedom". Article 55 adds, "With a view to the creation of conditions of stability and well-being

which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". These ideas have been taken up and developed by other instruments, such as:

The Universal Declaration of Human Rights in articles 22 to 28;

The International Covenant on Economic, Social and Cultural Rights;

The Proclamation of Tehran of 1968;

The Declaration on the Establishment of a New International Economic Order (General Assembly resolution 3201 (S-VI));

The Programme of Action on the Establishment of a New International Economic Order (General Assembly resolution 3202 (S-VI));

The Declaration on Social Progress and Development (General Assembly resolution 2542 (XXIV));

The Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV));

The Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX));

General Assembly resolution 3362 (S-VII) on development and international economic cooperation;

The Philadelphia Declaration of 1994, part of the Constitution of the International Labour Organization (ILO);

The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of 1977, adopted by the Governing Body of the International Labour Office. Article 4 of the Declaration states that "The principles set out in this Declaration are commended to the Governments, the employers' and workers' organizations of home and host countries and to the multinational enterprises themselves". Article 8 stipulates that all the parties concerned by the Declaration should respect the Universal Declaration of Human Rights and the corresponding International Covenants;

The Declaration on the Right to Development of 1986 (General Assembly resolution 41/128);

The Vienna Declaration and Programme of Action of 1993.

19. At regional level, the following may be mentioned:

The African Charter on Human and Peoples' Rights, articles 20, 21 and 22;

The European Social Charter;

The Protocol of Amendment to the Charter of the Organization of American States of 1985 and the 1988 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights.

20. These instruments and many more unequivocally lay down the obligation of individuals, groups of persons, States and the international community to combat impunity for those who violate economic, social and cultural rights.

21. This study will focus on two points:

The mechanisms of violations and their consequences for economic, social and cultural rights: an inventory of methods and practices which inevitably lead or have led to violations of economic, social and cultural rights;

The actual campaign against impunity: organizing the campaign against impunity for violations of economic, social and cultural rights and the rights to development and a healthy environment will require preventive and judicial measures.

I. SOME MECHANISMS OF VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

22. The events and acts that lead to the violations of economic rights can be of any kind. They are neither identifiable in advance nor necessarily known at all. They may be related to historical events or current and may affect individual or collective rights. The list that follows is therefore not exhaustive. It consists of cases chosen because of their seriousness or frequency. When they relate to a historical event, they are of interest for this study only because they have had, and continue to have, serious negative effects on the economic, social and cultural rights of individuals and peoples. These acts, which have led to serious, gross violations of the rights of entire peoples, have remained unpunished and, there has been no reparation for them. They involve mainly slavery, colonization, apartheid and the looting of the cultural heritage of the third world.

23. Present violations of economic, social and cultural rights are either national or international in nature. The following are examples of international practices that may give rise to serious, gross violations of economic, social and cultural rights: debt, structural adjustment programmes, deterioration of terms of trade, corruption, laundering of drug money, the activities of transnational corporations, pollution, etc. Violations committed on national territory, most of which are considered to be condemnable offences, include: embezzlement of public funds, misuse of company assets, corruption, tax fraud, financial speculation, unlawful enrichment, exploitation of illegal labour and migrant workers, etc.

A. Some historical background

24. The reason why the Special Rapporteur saw fit to refer to these violations is because they are still having a negative affect on the economic rights of entire peoples. From the point of view of current international

law, these violations are considered to be crimes against humanity, consequently not subject to a statute of limitations, and fall within the purview of the principles of universal competence. It need hardly be mentioned that the perpetrators of such acts (individuals or States) have been given complete impunity by the international community.

1. Slavery

25. Slavery was not new in the fourteenth century. It had been practised by other civilizations, but the way in which it was practised in black Africa, on African peoples, was out of all proportion to what was done in other times and other places. It was more costly in human lives, more destructive of the African social fabric; it was the source of greater economic and cultural looting than mankind had ever known. It was systematized to the point of being called "the Black slave trade".

26. The long period during which the slave trade flourished was begun by individuals, developed by companies and finally organized and directed by States, all of them European. The triangular slave trade, between Europe, Africa and America lasted for centuries and caused thousands of men and women to be uprooted from their societies and to perish during ocean crossings. Their suffering, the loss of their loved ones, the permanent destruction of their society and their culture, have never received the slightest reparation. Black Africa was left poorer, less populated and in a state of economic ruin from which it has never recovered. The scope of this report is too narrow for a detailed description of the numerous serious violations of the rights of all kinds, whether economic, social and cultural or civil and political, of the populations that were victimized.

27. The international community, the States involved, have recognized their infamy, and apologies to black Africa, even from the sovereign pontiff himself, are not sufficient to erase the severe harm done to the African peoples. A corollary of the slave trade was the enslavement of the indigenous populations living on the American continent at the time. To implement their projects of exploitation and domination, the advocates of slavery did not hesitate to commit a second genocide against the indigenous populations, whose survivors were dispossessed of their lands and cultural heritage.

28. When the international community became aware of the extent and seriousness of the phenomenon of slavery, it decided to abolish it, but slavery had already opened the door to another form of exploitation and domination: colonization.

2. Colonization

29. As in the previous system, the conflicts that preceded and accompanied the colonial conquests were brutal and inhuman. Professor Mohamed Bedjoui said that colonization was a social, economic and political act taking the form of legal relationships, domination and exploitation. From the point of view of international law, it is nothing but an attempt to establish a relationship of subordination between two nations in every sphere.

30. The pursuit of colonization entailed the distortion of some local structures and the establishment of others based on dependence. Such a system would have been less shocking to the conscience if the international community, through its deliberative body of the period had not authorized and encouraged it through the recognition and consolidation of the colonial conquests and the dividing-up of what had yet to be conquered by means of mandates and protectorates.

31. For centuries, the colonial Powers, easily identifiable today, pillaged the countries they had colonized, for the profit and on behalf of their nationals and to ensure their own development. With decolonization, these unbalanced relations either disappeared or took other forms to perpetuate domination and exploitation. The decolonization movement saw the process, not only as a severing of the bonds of domination, but also in terms of development, equality and restoration of wealth, which was naturally against the interests of the former colonial Powers. It has thus been said that one of the prerequisites for independence was to ensure maintenance of the status quo as it existed before decolonization.

32. One of the most important factors in maintaining that situation was the cooperation provided by the former colonial Powers, which used a series of constraints to impose its will on the former colony, now a State without means or power. In this unequal relationship between assisted and assister, the latter imposed its will and thus maintained the general orientation of existing or new structures in the economic, social and cultural spheres. Whatever form decolonization took, whether violent or negotiated, it led everywhere to the same disastrous situation of dependence and exploitation, maintaining an unfair world economic order which the developing countries, composed essentially of former colonies, insist should be revised to achieve a fairer balance.

3. Apartheid

33. Another form of domination and exploitation, apartheid, is a tragic vestige of colonization. Apartheid means the separate development of the races, but it was easy to see that what it really involved was the racially-based exploitation of the majority of the people by a minority. It was the system of government in South Africa for nearly a century, under the benevolent eye of the "developed" countries, who needless to say benefited from it.

34. From the time of the first Dutch colony, the whites gradually extended their domination over the whole of South Africa. This trend intensified with the arrival of the British and other white population groups, who were to use violent methods to appropriate nearly all the agricultural and residential lands in South African territory. The whites, who represented 20 per cent of the population, had control over and use of 80 per cent of the national territory, whereas the blacks, who represented 70 per cent of the population, controlled only 13 per cent of the national territory.

35. As stated above, this situation, maintained at the expense of the blacks, lasted for nearly a century. It should be added that that system was not used in South Africa only. What is today Namibia was governed in the same way.

36. For the population groups that were their victims, slavery, colonization and apartheid were sources of gross and serious violations of human rights and the right to development. They prevented those groups from exercising the human rights granted to every human being by international legal instruments.

4. The cultural looting of the third world

37. Concerning cultural rights specifically, works of art fraudulently acquired from former colonies are easily to be found in the museums of the Western world. This looting of the developing countries' cultural heritage, organized by the colonial Powers during their rule, is continuing through a traffic that is fraudulent and contrary to the national legislation of the peoples in question and the international legal standards protecting the cultural rights of peoples and individuals.

38. In addition to those mechanisms, which appear to be part of the past, there is also debt servicing, which has brought the debtor countries to their knees, a situation which will persist for a long time to come.

B. Present practices and procedures which are sources of violations of economic, social and cultural rights

1. Debt

39. It is urgent and absolutely essential to understand the catastrophic and intolerable predicament of the heavily debt-burdened developing countries.

40. The Lester Pearson Commission estimated that, by 1977, debt-servicing, i.e. annual repayment of principle and payment of interest, alone exceeded the gross amount of new lending by 20 per cent in Africa and 30 per cent in Latin America. In other words, the new loans which a developing country felt obliged to enter into for development purposes could not be used for development and would not even be enough to cover the servicing of existing debt. Developing countries will in future have to regularly take on new debt, not for investment, but for repayments.

41. In this way, debt which increases as it is repaid becomes a further bond of dependency. For many countries, it is an intolerable burden. This situation has led to debt crises in almost every developing country, necessitating alleviation or re-negotiation of their debt without any lasting solutions being found. Debt crises cause economic and social turmoil in developing countries. They upset relations between creditors and debtors and give rise to conflicts and political instability.

42. While indebtedness is increasing steadily at a rapid rate, with the grave consequences described above, official aid to developing countries is declining. The "developed" countries, which perpetuate this situation, and the international institutions, mainly financial (World Bank, International Monetary Fund), which act as their collection agencies, should revise their policies so as to ensure an international transfer of resources to the developing countries, their debtors, and spare them the difficulties caused by their indebtedness.

43. It will be recalled that, in 1944, the Bretton Woods Conference agreed to set up the World Bank and International Monetary Fund (IMF). Article 1 of the Articles of Agreement of IMF, sets out six objectives for the Fund, one of them being to facilitate the expansion and balanced growth of international trade and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of productive resources. IMF recommendations and guidelines, which are especially hard on countries wishing to renegotiate their debt, are in flagrant contradiction with the aims set out in article 1 of its statutes. It is worth noting that the loans granted to developing countries have actually been merely a series of fictitious operations bringing no benefit to the populations concerned, who are nevertheless called on to repay them. The loans granted in fact take different directions, none of which leads to the really needy segments of the population. They are partly used to service debt and partly misappropriated by those responsible for managing them, to be redeposited in the banks of creditor countries or reinvested companies in those same countries.

44. The main consequences of such practices are to multiply and exacerbate the problems of developing countries and to halt payments. The main victims are, of course, the deprived segments of society who have less to live on, and nothing seems able to halt their slide towards absolute poverty. There is every indication that perpetuating the debt of developing countries is a result of deliberate government policy designed solely to frustrate any attempt by the developing countries and their peoples to achieve economic progress.

45. It is clear that the international financial imbalances with regard to developing countries will continue to worsen as long as world economic structures are marked by unequal terms of trade. But there is also every indication that the perpetuation of debt means that it can be used as a powerful lever to bring developing countries to their knees, while providing their governing class with the means to cushion themselves and advocate an economic policy which is catastrophic for the vast majority of the world's poor.

46. Debt management also enables transnational corporations to frustrate any attempt by debtor countries to assert their sovereignty or chart the course of their own development. Because of the role which it now plays, debt is a tremendous instrument for domination which transnational corporations wield quite deliberately, like a weapon. The present economic policies of the "developed" countries are based on completely external parameters intended to protect and promote foreign economic interests.

47. The Bretton Woods institutions have failed in their mission to restore the world economic balance in the higher interest of all mankind. It is this failure and poor debt management which have produced two harmful and destructive practices in the form of structural adjustment programmes and, in particular, devaluation of debtor country currencies.

2. Structural adjustment programmes

48. The interdependence of national economies within the framework of the world economy is making cooperation between States increasingly important, and heightening the responsibility of agents and partners in development. Structural adjustment programmes are merely techniques or ways of managing shortages with the declared purpose of bringing debt under control. This approach to debt control has so far been a failure as blatant as it is significant. These structural adjustment programmes have inflicted enormous inhuman and counter-productive suffering on the deprived populations of debtor countries.

49. In a new approach to its social policy, the International Labour Organization is doing everything possible to alleviate social deprivation, not only by creating "safety nets", but also by taking preventive action in establishing a more intensive dialogue with a view to influencing Bretton Woods institutions. On 21 June 1993, the Internal Labour Conference reaffirmed and endorsed this approach by adopting the resolution entitled "Resolution concerning social protection and the alleviation of unemployment and poverty, and the social dimension of structural adjustment and transition to a market economy".

50. Structural adjustment programmes impose a heavy burden on workers living in poverty and on other vulnerable groups such as women, children, the unemployed, the jobless and the handicapped, and measures taken by States mean that public spending on basic education and health is considerably reduced. Wage levels fall and job losses are frequent. In short, no economic, social or cultural human right is observed or protected. Taken to their conclusion, these measures may produce substantial changes in currency exchange rates, reduced purchasing powers of workers and deprived segments of the population and intolerable inflation.

3. Corruption

51. The word "corruption" means the abuse of public trust for private purposes. It is a moral phenomenon, even though in the vast majority of cases money is involved. A public office is used for the benefit of one or more individuals, rather than in the national interest. Corruption may exist independently of any financial benefit; it is universal.

52. The Interregional Seminar on Corruption in Government, held under the auspices of the United Nations at The Hague (11-15 December 1989) in cooperation with the Department of Technical Cooperation for Development, carried out analyses which identified impunity as an underlying element of the various forms of corruption.

53. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August-7 September 1990) noted in its resolution 7 on corruption in Government that this form of corruption was universal, that it had deleterious effects on the economies of developing countries and that those effects were felt in developed countries. Corruption implies interaction between at least two parties: the party which proposes it (the corrupter, who plays the more important role) and the party which agrees

to it (the corrupted). With this in mind, the United Nations Congress proposed the adoption of measures not only against corrupt officials, but also against enterprises practising corruption.

54. The Commission on Human Rights, in its resolution 1992/50 on the fraudulent enrichment of top State officials, pointed clearly to the responsibility of the North in connection with the fraudulent enrichment taking place in the South and thus raised the question, still unclear in international law, of the restitution to despoiled peoples, for reinvestment in local economic, social and cultural development, of the funds which their leaders have extorted from them, as often as not with the complicity of foreign banks.

55. The existence of a public sphere and a private sphere is a prerequisite for corruption. In other words, civil society must exist side by side with the State. The phenomenon of corruption exists when private interests condition and determine the functioning of the public sphere. Several forms of corruption are possible, which raises the difficult problem of a typology of various forms of corruption. With this in mind, we must avoid lumping together minor forms of corruption (e.g. on the part of public officials) with major forms considered as violations of human rights.

56. Corruption is a phenomenon which has grown over the years. José Arthur Rios wrote: "Corruption is the product of inverted ethics, in that the act of corrupting involves the idea of reciprocity, which is actually an element of equity and justice". In a modern society, this rule of reciprocity, results in corruption when it involves transactions which subordinate the management of public resources to the interests of the private sector. In primitive societies, the practice of gift-giving establishes a web of obligations between the groups. This network is functional and legitimate in such societies and in theory raises no question of corruption. Gift-giving can become an instrument enabling some individuals to impose their will on those who are unable to reciprocate. This latter group ends up working for the private sphere at the expense of the public sphere or the general interest.

57. The advent of modern society based on mercantilism and the cash economy endowed money with three separate functions which often make it the catalyst for the phenomenon of corruption, since money:

Is incompressible and can be transferred unobtrusively from one person to another;

Can be used for any transactions by virtue of its abstract nature;

Nullifies the effect of distance by permitting remote transactions.

58. As noted earlier, corruption is universal, but it should also be noted that it was introduced and developed mainly in the developing societies of their now former colonies by the colonizing States.

59. Nowadays, all States suffer from the same phenomenon to varying degrees. In those societies where it exists, corruption thus becomes a functional phenomenon operating at all levels and in all spheres of activity.

60. It has rightly been pointed out that corruption cannot thrive in a pluralistic and democratic society.

4. Fiscal and customs fraud and other economic offences

61. Fraud includes all fraudulent actions intended to reduce tax liability or evade taxation. It means the direct or indirect violation of tax law. The concept is still vague and, although all countries combat the phenomenon, no clear definition has yet been arrived at either by consensus or on the basis of national judicial practice. It obviously involves corruption to the extent that some tax officials accept arrangements for a consideration. The defrauder is almost always a corrupter. Fraud, whether fiscal or customs, employs the same methods. In some cases, it has ended in violence and has cost the lives of many officials who were either too honest or too corrupt, and clearly infringes both individual and collective rights.

62. There are of course other sources of violations of economic, social and cultural rights of individuals and peoples, including:

Misappropriation of public funds;

Misuse of company assets;

Financial speculation;

Exploitation of migrant workers;

Unlawful or fraudulent enrichment;

Laundering of drug money;

Culpable complicity of some banking firms in accepting funds which have been fraudulently acquired, etc.

As these sources of violations are known and declared punishable offences in the emerging body of international criminal law, there is no need to review them in detail; if necessary, this could be done in the final report.

II. THE EFFECTS OF SUCH PRACTICES ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

63. The practices and procedures outlined above have a negative impact on economic, social and cultural rights and on the rights to development and to a healthy environment. They have led, and continue to lead, to the violation of those rights, and even to their being completely disregarded by those who are responsible for and benefit from them.

64. Slavery, colonialism and apartheid, which have all disappeared or are presently disappearing, have in the recent past accounted for most of the mass violations of human rights, whether collective rights, such as the right to development and the right to a healthy environment, or individual economic rights. In any event, these rights are all closely interrelated, as collective rights provide the framework for the enjoyment of individual

rights. Collective rights are to individual economic rights what democracy is to civil and political rights. None the less, while civil and political rights are now an accepted and integral part of most national legislation, the same cannot be said for economic rights, which have aroused greater reticence on the part of developed countries. That is particularly true of the right to development, which has met with a negative attitude on the part of those countries because in their view, the content of those rights is vague and development is really a question of fact rather than a right. For a variety of reasons that have to do with their selfishness, they have shown the same attitude towards the right to a safe environment, or they apply that right in such a way as to disregard the rights of others.

A. Violations of collective or community economic rights

1. Violations of the right to development

65. The right to development grew out of economic inequality and the disadvantaged position of underdeveloped countries. It establishes the principle of reparation to which the peoples and countries which have long been robbed of their wealth are entitled. The enormous inequalities of all sorts between poor countries and developed countries are the result of centuries of pillaging and exploitation during which civilizations were destroyed, social structures and means of production wiped out and the ecosystem devastated in Africa, Asia and Latin America. Unequal distribution of wealth and income on both the national and international levels has worsened in recent decades and has now reached such dimensions as to be a genuine international scandal.

66. The Global Consultation on the Realization of the Right to Development as a Human Right, which took place at Geneva from 8 to 12 January 1990, essentially concluded that the traditional development strategy was transnational in scope and generally consisted of creating modern industrial enclaves and zones of exclusion in developing countries. Those enclaves and zones generally had nothing but negative effects and were part of a transnational corporations' strategy of spreading their activities among different countries, with their subsidiaries producing finished products for export markets or protected domestic markets. Such establishments have usually proved to be unstable because, the parent company can decide, for commercial, economic or political reasons, to move its subsidiaries to other countries. The idea is to evade the respective national laws governing economic activity, which results in violations of the right to development of the populations within a country, or even of the populations of several countries which depend on such establishments.

67. Traditional development strategies have also resulted in the creation of privileged national élites which follow the same patterns of consumption as high-income groups in developed countries, while the vast majority of the population cannot even meet their most basic needs. That is how the leaders of developing countries, particularly in Africa, have been designing their national economic policies for almost half a century. Nor is this gap in incomes and lifestyles limited to the developing countries; it also exists

in the developed world, where it is increasingly frequent. As stated above, the actors and beneficiaries of those strategies are very few, compared with the overwhelming deprived majority.

68. Such practices, when combined with the negative impact of the debt burden and of deteriorating terms of trade, prevent the peoples of developing countries from realizing their right to development.

2. Violations of the right to a healthy environment

69. The major environmental crises of recent decades have highlighted the transnational and multi-dimensional nature of their effects and have shown that the solutions required are collective ones which can therefore be carried out only by the international community and by States themselves, either individually or in cooperation with the United Nations as called for in Articles 55 and 57 of the Charter. A balanced ecosystem, preservation of natural resources or simply the survival of the planet are urgent demands which, if they are not met, could result in the annihilation of our system.

70. The right to a healthy environment has been violated as a result of human activities which increase concentrations of greenhouse gases in the atmosphere, and that in turn has an impact on global warming, rising sea levels and the climate in general. Those phenomena have their own negative impact on the enjoyment of human rights in general, and on economic, social and cultural rights in particular, while their negative multiplier effects further exacerbate the increasingly serious and numerous problems faced by the populations of poor regions.

71. Human activities which affect the right to a healthy environment also take the form of deforestation and clearing which over the centuries have caused environmental degradation and substantial losses of forest.

72. According to the report of the Secretary-General of the United Nations Conference on Environment and Development on the conservation of biological diversity, biological diversity is fundamental to human life. It is a basic feature of the way in which living organisms are structured. As such, it provides support for ecosystems, for the regulation of water and the atmosphere and the basis for agricultural production. When genetic variations are lost, therefore, not only are specific and potential properties and adaptations also lost, but with them species are diminished, ecosystems are impaired and the ability to sustain human life is damaged. That destruction of the ecosystem and of the equilibrium necessary for the survival of our species is aggravated in modern life by the effects of such contemporary human activities as pollution and the dumping of toxic and hazardous wastes.

73. Pollution of the land, sea and air by various sources causes major risks to the life, health and well-being of populations. The Bhopal and Chernobyl disasters are just two examples among many which are still vivid memories. They claimed many victims. According to estimates by the League of Red Cross and Red Crescent Societies, the Chernobyl disaster affected, and continues to affect, more than 4 million people, in addition to the 135,000 people

evacuated from the villages closest to the reactor, who are still living on contaminated land. Those victims fear for their future, exposed as they are to congenital illnesses and malformations.

74. Ecological disasters, nuclear or otherwise, risk destroying all forms of life. The right to a healthy environment is closely linked to economic, social and cultural rights. The exportation to developing countries, particularly in Africa, of hazardous waste produced by the industries of the North is in our opinion a serious violation of the most important human rights, foremost of which is the right to life.

75. The scandals of 1987 and 1988 which followed the discovery of deals whereby African countries, received derisory sums of money from western companies in return for the use of land for the dumping of toxic waste, brought a justifiably violent reaction from some developing countries. It is in that context that the Council of Ministers of the Organization of African Unity (OAU) declared in its resolution 1153 (XLVIII) of 25 May 1988 that the dumping was a crime against Africa and the African people. On 7 December 1988, the United Nations, following in the footsteps of OAU, adopted a resolution in which it expressed profound concern regarding practices of dumping nuclear and industrial wastes in Africa.

76. The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal was the result of a compromise between those who favoured a complete ban on transboundary movements of waste and those who wished to define the framework and legal conditions for the transfer of wastes.

77. Without due vigilance, that trend could negate all rights protecting the environment or human beings. Given the extent of violations of the right to a healthy environment, the international community expressed its profound concern, at the 1992 Earth Summit noting that some international movements of toxic wastes were in contravention of national legislation and existing international instruments, seriously damaging the environment and public health in all countries.

B. Violations of individual economic, social and cultural rights

78. These violations pertain particularly to the right to work and the rights to adequate food, housing, health and education. There is no doubt that those rights rest on the most important right of all, namely, the right to life. They all revolve around and centre on that right, if by "life" is meant everything that contributes to the continued existence and improvement of the human condition.

1. Violations of the right to work

79. The report of the International Labour Office, or World Labour Report 1995, explains that the employment situation in developing countries, particularly in sub-Saharan Africa, is determined by local market conditions which continue to discourage both domestic and foreign investment. The explanations provided by the Director-General of the International Labour Office are far from satisfactory, especially when he states that African

countries should undertake major reforms. In our humble opinion, the explanation is rather to be sought in the injustice and imbalance engendered by the world economic order.

80. The ILO report suggests that the only area where Africa has not been marginalized is that of aid. We think that the "aid" in question could easily be discontinued entirely if global wealth were distributed equitably among all nations. Debt service and structural adjustment programmes prevent the sometimes insignificant aid granted to developing countries from having a positive impact on their fragile economies.

81. Shortages or serious crises have inevitable consequences on the labour market with increasingly frequent recessions hampering the development of any policy aimed at improving working conditions. Unemployment becomes a daily concern for the individual as well as for society and the search for work a priority. Workers and their families who are affected by job instability or insecurity are extremely vulnerable.

82. Workers also face serious risks in performing certain jobs, as the ILO conventions intended to protect them are never applied. Increasingly, international labour requirements, particularly those contained in ILO conventions and recommendations, are seldom observed.

83. The fate of migrant workers is more serious still, since they are exploited clandestinely and by unscrupulous employers, without any form of protection and sometimes even with the complicity of the host State. Violations of the right to work take several forms, as noted by the Special Rapporteur on the realization of economic, social and cultural rights in his second progress report:

(a) Extreme falls in wage levels, with corresponding declines in living standards;

(b) Increased levels of unemployment;

(c) Restrictions on trade union freedom;

(d) Reductions in worker protection in terms of occupational health and safety standards;

(e) Limitations on the right to strike; and

(f) Weakened bargaining power of the industrial working class.

2. The right to health

84. The precariousness of health today is a cause for concern. Health care is available to fewer and fewer people and is becoming exorbitantly expensive. The spread of serious diseases should lead to greater solidarity between the rich and the poor, since the security of the rich lies in providing for the health needs of the poor. Actually, the continents have grown closer together, and no illness or human suffering can be contained within a State's borders.

85. Health costs are taking their toll on all economies, even in developed countries. Medical treatment costs as much as the medication prescribed which puts both beyond the reach of the most disadvantaged segments of society, namely, workers, children, women and the elderly.

86. The individual's right to health should be the concern both of States and of the international community. The international community should be more involved and cooperate more with States, in accordance with the Charter of the United Nations. In order to do so, however, it is important that the demand for a new balance in the world economic order and all subsidiary systems be met. It is well known that 20 per cent of the world's population controls 80 per cent of the world's resources and enjoy technological benefits. This increasingly pronounced imbalance exposes the disadvantaged vulnerable groups and peoples of the third world to serious shortfalls in all areas, including health.

87. The concentration of pharmaceutical industries and the means for combating serious contemporary diseases (such as AIDS) in the hands of a few industrialized countries prevents most of the world's population from benefiting from the major scientific achievements and discoveries of this century.

88. It cannot be over-stressed that environmental pollution exposes fauna and flora to serious risks of extinction and poses serious health problems.

3. The right to adequate food

89. Putting an end to hunger and poverty, both present and future, is an old promise of the international community which was made after the Second World War. That promise has never been kept, nor has any effort ever really been made to keep it. The wealthy States preferred to embark on an insane and increasingly expensive arms race which drained their economies and diverted funds from aid for developing countries.

90. It is said that, if the arms-producing countries withheld 5 per cent of their military expenses and paid those funds out to needy countries and peoples, the latter would be able to undertake, and probably to succeed in, launching their development, as long as the current economic order becomes fairer and more equitable, of course. Famine reigns in many countries and is now affecting people who were previously believed to be safe from it. Food shortages, compounded by burgeoning growth in world population, make the realization of the right to adequate food daily more remote.

91. The pollution resulting from industrialization and the use of certain substances is leading to the destruction of all forms of animal and plant life and consequently of all sources of food. The same effects are produced by the reckless deforestation of some areas of the third world. That deforestation, which has not been accompanied by any reafforestation, has caused dislocation which is spreading to recently unarable lands.

92. It should also be noted that neither national nor international legislation has ever provided for the protection of natural resources and wealth which could permit each individual and people to enjoy the right to adequate food.

93. The right to adequate food is not simply a matter of the abundance of food, but also of its quality and of the struggle against the widespread increase in malnutrition, especially among vulnerable groups. The rising costs of food, declining food security, lower production costs and cutbacks in public subsidies on basic foodstuffs also have a negative impact on the right to adequate food. The primary consequence is that many families spend most if not all of their income on food. The widespread decline in household purchasing power, compounded by the rising costs of food products, has a negative impact on the realization of that right.

94. Transnational corporations, through their speculative dealings, maintain the scarcity and cost of foodstuffs.

4. The right to adequate housing

95. The right to adequate housing is based on a set of norms related to other rights of the individual and his human environment. It contributes to people's cultural life and provides the necessary harmony between man and his habitat.

96. The realization of that right should take into account cultural and social elements and respond to the needs of all levels of society. Importing housing models is often, if not always, destructive of that harmony. The housing crisis of past decades was for many persons and peoples the result of a disregard for the right to adequate housing. One United Nations document stated that the difficult economic situation of many countries in the early 1980s was reflected in a rapid decline in resources available for investments and related services in the field of human settlements.

97. National legislation on housing subsidies, rent controls and housing loans has continued to lose ground to the private sector.

98. The extent of speculation on housing has meant that for thousands of people the right to adequate housing has been increasingly difficult to realize. In many countries such speculation has furthermore facilitated the development of eviction procedures which in no way take account of that right. The absence or inadequacy of public control over housing and related services has deprived the right of all its content.

99. In any case, it should be recalled that the public authorities themselves very often embark on the nationalization or expropriation of settled lands without providing sufficient compensation to those affected.

5. The right to education

100. The right to education is increasingly difficult or even impossible to realize in many countries, especially in the third world. Like all economic rights, it requires a financial and material base which is not available to a large part of the population. Violations of and disregard for the right to education take the form of insufficient schooling for children, a high proportion of school drop-outs and constantly declining rates of literacy.

101. The quality and standard of education is at present seriously affected as a result of the shorter working hours, smaller numbers and diminishing skills of teachers.

102. A UNESCO study shows that in the hundred least advanced countries, the education budget has been almost halved over 10 years. This reveals a clear lack of concern for education on the part of national authorities. Similarly, the World Bank has shown very little regard for the difficulties surrounding the realization the right to education by imposing harsh cuts in the educational budgets of developing countries.

103. The principle of free primary and even secondary education in many African countries had in the past enabled many poor people to receive at least basic teaching. Now that this principle has been abandoned, education, which has become as expensive as health and housing, is out of reach of the poor.

C. Violations of the economic, social and cultural rights of vulnerable groups

104. There is no doubt that the so-called vulnerable groups, which include children, women, migrant workers, the old and the poor, are the most exposed to and the most affected by massive human rights violations.

105. In a document entitled "Overall Socio-economic Perspective of the World Economy to the Year 2000", the United Nations commented that as the overall economic prospects for Africa and Asia were unfavourable, with very slow or nil income growth, the incomes of the poor would not rise enough to eliminate poverty and undernutrition.

106. According to the World Bank, 0.7 per cent of GDP, which would be equivalent to a 20 per cent income tax on the richest fifth of the population, would be sufficient to raise the income of all the poor in Africa to just above the poverty threshold. Of course, the advanced economies are also suffering from the current economic crisis in the world. They have been forced as a result to take derestrictive measures, which have led to mass unemployment, inflation and real insecurity.

107. In some developed countries, particularly in Europe, restructuring and economic policies should be expressly aimed at improving the fate of deprived, fringe groups such as invalids, migrants, and the members of ethnic, language and religious minorities. Governments should try to ensure full participation by these groups in economic, political and social activities, as a means of exercising their human rights. It should be recognized that the measures taken by international financial institutions have had a tendency to aggravate poverty and to widen the gap between rich and poor.

108. These problems are still more severe in rural areas, where the failures of political and economic policies are more acutely felt; millions of people at present living in rural areas cross the threshold of absolute poverty every day. Poverty also affects the developed countries with liberal economies, where all the sectors of the population which are unable to compete are pushed aside. All the rights of the poor are thus disregarded or violated without any effort being made to halt the tendency. In this case the economic base

is a constituent part of the law. The same applies to children, women, old people and workers. It is worth remembering that the United Nations organization and its specialized agencies have together with the member States prepared a series of international instruments aimed at combatting and preventing the ills endured by these groups. Drafting a legal instrument is one thing, however, and applying it is another.

109. The economic protection of vulnerable groups is an essential precondition of the realization of their economic rights. This obligation, for which the States and the international community are responsible, has often been and may for long continue to be ignored in view of the clear lack of determination on all sides.

110. It has been pointed out quite rightly that if United Nations conventions and declarations, in whatever field, are to be really respected as a system of international law, then they must be binding not only for the member States but also for the international institutions.

III. THE STRUGGLE AGAINST IMPUNITY FOR VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

111. Organizing the struggle against impunity for violations of economic, social and cultural rights, if it is to have any effect, requires detailed, comprehensive and objective investigations. In this respect the analysis of the problem in the first part regarding impunity for violations of civil and political rights may be considered relevant. As far as the violations discussed in this part are concerned, there appear to be two types of action worth considering:

(a) Preventive action, including all political, economic, legislative and administrative measures aimed at eliminating all practices or procedures conducive to violations of economic, social and cultural rights;

(b) Repressive or remedial action, aimed at penalizing violations which have already been committed. Sanctions could take the form of a series of practical measures, such as restitution, indemnification, compensation, cancellation, etc.

112. Clearly, where economic, social and cultural rights are concerned, compensatory sanctions are by far the most important and the most significant, which does not mean to say that the importance of repressive penalties should be overlooked.

A. Measures to prevent violations of economic, social and cultural rights

113. The experience of three decades of efforts to realize economic, social and cultural rights has brought to light many difficulties related to the actual nature of the rights concerned and to the specific character of the peoples and regions of the world which exercise them. While it is true that every people or region has its own specific character, the necessary interdependence between different human rights must not be overlooked. Preventing the violation of these rights is a task which must be jointly

undertaken by the States and the international community. It should also be remembered that each State is responsible for drafting appropriate legislation and regulations and for implementing an economic and social policy allowing individuals and peoples to enjoy economic, social and cultural rights.

114. Preventive measures are important and go some way towards offsetting the vagueness surrounding economic offences and related sanctions. One doubt as regards international law in particular concerns the empirical means deployed. In this respect there should be close cooperation among States and between them and the international community.

115. Preventing violations of economic, social, cultural or any other rights is undoubtedly the ideal solution, though also the most difficult. The first step should be an effort to inform and reeducate public opinion and a more courageous political attitude on the part of governments and victimized peoples.

116. From an international point of view, it is worth reiterating the now classic suggestion that a more coercive and more coherent legal framework should be set up to encourage States to accept their obligations under international law.

117. Since the beginning of the century, the State's responsibility in modern international law has been recognized. This recognition was further strengthened by the Brussels Convention of 25 May 1962 on the Liability of Operators of Nuclear Ships, the Brussels Convention of 29 November 1969 on Civil Liability for Oil Pollution Damage and the Vienna Convention of 29 November 1971 on the international liability for damage caused by space objects.

118. Recommendations on international cooperation for crime prevention and criminal justice in the context of development were adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, August-September 1990). In those recommendations, governments were urged to promulgate laws to combat transnational crime and illegal international transactions. It was added that, since even legitimate enterprises, organizations and associations might sometimes be involved in transnational criminal activities affecting national economies, Governments should adopt measures for the control of such activities. They should also collect information from various sources so as to have a solid base for the detection and punishment of enterprises, organizations and associations, their officials, or both, if they are involved in such criminal activities. In paragraph 8 of the recommendations, it was suggested that all nations should devise effective criminal legislation to combat the corrupt activities of public officials, which can hinder development and victimize individuals and groups, and all other offences having the same consequences.

119. In other words, in domestic law, all mechanisms and practices leading to violations of economic, social and cultural rights should be identified as punishable offences, giving entitlement to compensation. In its General Comment No. 3 (1990), the Committee on Economic, Social and Cultural Rights discussed the nature of States parties' obligations arising under article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural

Rights. It was suggested that the adoption of legislative measures was by no means exhaustive of the obligations of States parties, but rather the phrase "by all appropriate means" should be given its full and natural meaning; such measures should include the provision of judicial remedies with respect to those rights. That comment, which also applies to economic, social and cultural rights, means that States should avoid any deliberately retrogressive measures in that regard.

120. This should certainly be the case at international level. There are many different kinds of preventive measures which would be needed for the effective realization of economic, social and cultural rights. Some of them could be drawn up by the United Nations with the agreement of member States, while others would be prepared jointly by the latter and United Nations agencies.

121. With regard to the first of these possibilities, it is worth recalling some suggestions which were made in the past and which were never applied. One example is the preparation and adoption of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, like the one already before the Committee on Civil and Political Rights. This suggestion could be useful in more ways than one, especially if supported by an obligation on the part of the States to report to the Committee on Economic, Social and Cultural Rights concerning all measures taken for the effective enjoyment of these rights and the sanctions applied to violations thereof.

122. The international community should endeavour to rectify current deviations from the International Monetary Fund's mission. In 1944, the Bretton Woods Conference agreed to set up two international financial institutions, the IMF and the World Bank.

123. Article 1 of the IMF's Articles of Agreement establishes six purposes for the Fund, one being to facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of productive resources. In its corrective action, the international community should bring the international monetary institutions back to their initial purposes, as defined in article 1 of the IMF's Articles of Agreement.

124. Although applying the procedures of an optional protocol would not give that body any jurisdictional authority, it would provide an opportunity through regular reports and individual communications, to submit useful recommendations to the States parties. This would be an important step towards combatting impunity for violations of economic, social and cultural rights. Until such a body is set up and functioning, it would be worth encouraging the CERD, the Human Rights Committee and the Working Group on Communications (1503 Procedure) to examine very closely periodic reports by the States and individual communications received by these United Nations bodies.

125. In the preparation of preventive measures against human rights violations, non-governmental organizations could contribute by denouncing such violations and suggesting solutions. This would be another way of supporting

United Nations bodies who are responsible for human rights and the States in their constant efforts to protect and promote economic, social and cultural rights.

126. With regard more specifically to the cultural wealth of peoples, it would be important and essential to prepare and have the States adopt a convention protecting the cultural wealth of peoples, to declare any traffic involving that wealth as a crime against humanity and to ask States to introduce sanctions for such acts in their domestic legislation.

B. Jurisdictional measures against impunity

127. Violations of economic, social and cultural rights should give rise to compensation for the damage they have caused. It has been pointed out that from the point of view of domestic legislation such violations are offences, subject to two types of sanction, repressive and compensatory.

128. Under its guarantee obligation, the State should provide the necessary legal framework to safeguard the enjoyment of economic, social and cultural rights. The best way to do this is to incorporate international legal standards into national law, in order to be able to invoke them before the domestic authorities and courts. If violations extend beyond domestic boundaries and affect several countries, the international obligations of those responsible, whether individuals, or human groups or States, become implicated.

129. These two types of responsibility, national and international, are not cumulative; they are complementary or supplementary. Thus, the international responsibility of a subject of law can only be invoked when no domestic remedy is available or if domestic remedies have been exhausted or are inadequate. The intercession of international bodies presupposes that the unlawful act that constitutes an economic crime has been defined.

130. While, under domestic law, criminal law offences are dealt with under enforceable legislation, the same is not true in international law, where States freely decide their conduct. Thus, an international offence, as determined by international legal norms, is the result of an act or of conduct that is morally and legally imputable to a subject of law and which entails its responsibility.

131. Punishment of an economic crime and reparation for the damage it causes raises a number of questions. Who is responsible for the offence? Who is the victim? What types of punishment may be effective against it?

1. Who is responsible?

132. Under both domestic and international law, an unlawful act renders the perpetrator responsible. Under domestic law, the juridical acts that give rise to obligations entailing the responsibility of a subject of law (an individual or a State) are specified by law. Nowadays, although State responsibility is no longer disputed, it gained recognition at a relatively late stage in the domestic sphere, where it had long seemed virtually incompatible with the lopsided relationship between the State and its subjects.

133. Under positive law, bringing a suit against the State poses no problem. However, in actual practice, this is not quite the case: the high cost of legal proceedings prevents many victims from availing themselves of their right to equality before the courts and the right to a fair trial, frequently leading to impunity for the perpetrators of violations of the economic, social and cultural rights of individuals or groups. Under international human rights law, the international responsibility of States constitutes a regulatory and stabilizing mechanism whose rationale is drawn from the premise that there is no authority without the corresponding responsibility for whoever exercises it.

134. Most of the constitutional rules of States recognize this regulatory and stabilizing role of international law and the principle of its precedence over domestic law. The case of the International Court of Justice (ICJ) confirms this principle and specifies that a domestic act that is in conformity with domestic law, and thus lawful, is nevertheless unlawful if it violates international law (advisory opinion of the ICJ of 4 February 1932 concerning the treatment of aliens). A national law may thus be unlawful internationally, hence the logical conclusion that no State may invoke its own legislation to violate the rights of an individual (whether a citizen or an alien).

135. The responsibility of the State, as a legal person, is entailed through the acts and deeds of its representatives, i.e. the organs and officials responsible for running its services. It is responsible for the acts of its officials and is liable for both moral and material injury. Incompetence or abuse of authority by its agents do not absolve it from responsibility; any such failings and excesses may not be invoked against the victims.

136. Transnational corporations, whose activities, on account of their diversity and underlying bad faith are frequently beyond the control of the host State, are the source of serious and unpunished violations of economic, social and cultural rights.

2. Who is the victim?

137. Obligations arising out of the responsibility of States or other subjects of law for violations of the international system of human rights give rise to corresponding rights on the part of individuals subject to the jurisdiction of the State responsible for the violation. International law recognizes the right of victims of human rights violations to reparation, and consequently to a valid remedy. However, the question that arises is who is the victim, the violation of whose rights calls for reparation?

138. Clearly, individuals and groups may be the victims of gross or systematic human rights violations. In order to define the concept of an individual and collective victim, it is worthwhile referring to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

> "1. 'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, ...

> 2. ... The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

139. Another approach is to consider a victim to be anyone who can prove that he has been injured. In the case of violations of economic, social and cultural rights, any person or State able to prove the existence of injury must be able to seek reparation. Such reparation may be sought before a national court or an international body.

140. Under both domestic law and international human rights law, the legislative provisions that establish and organize the remedies available to victims must be erga omnes, i.e. capable of being invoked against all parties.

141. It should also be emphasized that some States set up parallel legislation which protects them and enables them to violate the rights of citizens with impunity. This is the case when a State decides that the property of a State-owned company is immune from attachment and consequently unaffected by any decision of the courts, despite the fact that many such companies increasingly operate as ordinary economic agents, entering into private-law contracts and transactions with individuals.

142. Under domestic law the status of victim and the rights attaching thereto are transmissible to rightful claimants. The inequality between the parties involved frequently upsets the balance between the perpetrator of the violation of a right and his victim. This inequality is corrected by certain practices such as the appointment of an assigned counsel or legal aid. These institutions would be of substantial benefit in the international sphere.

143. The international community, in conjunction with member States, should work towards the development and implementation of rules that transform the right of each individual or people into legal reality.

3. Possible penalties for violations of economic, social and cultural rights

144. Domestic law lays down penalties and reparations for injury caused to the victims of violations of economic, social and cultural rights. It is the responsibility of the State to develop the legal framework necessary to protect these rights.

145. This idea is summarized in the decision handed down by the Inter-American Court of Human Rights in the Velasquez Rodriguez case:

> "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."

146. The injury for which reparation is requested may be material or moral. All national legislations have long accepted compensation for moral injury, both for the direct victim and for his rightful claimants. In the

international sphere, this idea would seem to have gained acceptance, although rather late. It may be inferred from the current case law of the international legal bodies that the basis for determining the amount and nature of the compensation is not solely the physical or material injury or damage, but also the direct or indirect moral injury, i.e. that sustained by the victim himself or his rightful claimants. In its observations on communication No. 107/1981, the Human Rights Committee stated that the mother of a disappeared person was herself a victim:

> "The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. ... In these respects, she too is a victim of the violations of the Covenant suffered by her daughter ...".

147. Other bodies, such as the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, the Commission of Enquiry set up under the Constitution of the International Labour Organization, the European Court of Human Rights, etc. have all confirmed this principal.

148. By recognizing the right of moral victims to seek and obtain reparation, these bodies also recognize that States are obligated to provide remedies under their legislation. This term designates all the administrative or judicial channels whose purpose is efficaciously and constructively to punish violations of individual rights. Where economic, social and cultural rights are concerned, the punishment may vary depending on which right has been violated.

149. In the case of collective or communal rights, the appropriate punishment must be of an essentially reparative nature. Thus, for example, compensation in the form of cancellation of debt and debt-servicing could partly repair the injury caused by slavery and colonization. As is pointed out elsewhere, there are numerous historical and legal reasons to justify, in many cases, cancelling and in others reorganizing debt on more satisfactory terms, periods of repayment, grace periods and rates of interest. The question of debt and its cancellation has consistently been raised by the developing countries.

150. Cancellation of the debt of formerly colonized countries was raised long ago in New Delhi, at the Second Session of the United Nations Conference on Trade and Development. Mr. Louis Negre, then Minister of Finance of Mali, made the following statement:

> "Many countries could legitimately have contested the legal validity of debts contracted under the auspices of foreign powers ... Beyond purely legal considerations and rightful claims we merely wish to ask their developed creditor countries to show a great spirit of equity or even justice by proposing, as a test of their goodwill, the cancellation of all debts contracted during the colonial period by interests that were essentially not our own, and for whose servicing our States are unjustly responsible".

151. History has shown that the huge inequalities are the result of centuries of plundering and exploitation during which civilizations, social structures and indigenous modes of production were destroyed and during which the ecosystems of Africa, America and Asia were pillaged. The spoliation of many countries and the impoverishment of the majority of the world's population are continuing in different forms: deterioration of the terms of trade, debt renegotiation, transfer of resources from the South to the North, capital flight, structural adjustment, massive deforestation, exploitation of toxic waste, introduction of polluting industries, etc.

152. Above and beyond compensation as a form of reparation, provision has to be made for complementary compensation and a systematic cessation of violations of economic, social and cultural rights.

153. Reparation for the injury caused by violations of economic rights under apartheid, which involved successive confiscations of the land and cultural property of the victimized black populations, means restitution and the payment of fair compensation. In addition, those laws and regulations that continue to permit such practices should be abrogated.

Suggestions

154. At the present stage of efforts to combat impunity for violations of economic, social and cultural rights, the following suggestions may be made:

1. In view of the violations of the economic, social and cultural rights of countries and peoples that were colonized or subjected to slavery, and as compensation for the injury they have suffered, all or part of the debt of the States concerned should be cancelled; in addition, the remaining debt should be reorganized on fairer and more humane terms. This approach would eliminate a number of violations of economic, social and cultural rights and simultaneously remind the Bretton Woods institutions of their primary mission, as set out in full in article 1 of the statute of IMF.

2. Violations of economic, social and cultural rights should be declared international crimes that are consequently subject to the principles of universal competence and imprescriptibility.

3. An optional protocol on economic, social and cultural rights, similar to the optional protocol on civil and political rights, should be drawn up and adopted by States.

4. More sophisticated norms should be proposed to States, as a means of combating impunity in cases of corruption, misappropriation of public or private funds, prevarication by public officials, and tax and customs fraud and lastly, efforts to combat them should be strengthened and greater consideration given to the injury suffered by victims.

5. Machinery for monitoring the management of public affairs should be set up and constantly improved by providing appropriate material and financial assistance to States requesting them.

Recommendations

155. Beyond the consideration of the preliminary report, it would seem advisable to hold a high-level international meeting to address the problem of impunity for violations of economic, social and cultural rights so as to gather the necessary information from a variety of sources in order to prepare the final report.

156. By their efforts, the United Nations experts, and representatives of governments and of non-governmental organizations could not only broaden the scope of the study but conduct a more searching analysis of the topics addressed.

157. Such a meeting would also make it possible for the organizations affiliated to the United Nations (UNESCO, ILO, IMF, WHO) to make their contribution in their sphere of competence.

158. These suggestions and recommendations, which are far from exhaustive, could be added to and improved by those made by other experts and representatives of governments and of non-governmental organizations.